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No. 83-1727

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

LOUIE L. WAINWRIGHT,
Secretary, Department of
Corrections, State of Florida,

Petitioner,

vs.

ROBERT LARRY CROW,

Respondent.

ON PETITIONS FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
ELEVENTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

Wm. J. Sheppard
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

COUNSEL FOR RESPONDENT

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ISSUE

WHETHER THIS COURT SHOULD INVOKE ITS CERTIORARI JURISDICTION TO REVIEW THE DECISION OF THE ELEVENTH CIRCUIT COURT OF APPEALS BELOW WHICH HELD THAT THE STATE COURT PROSECUTION OF RESPONDENT FOR SELLING COUNTERFEIT SOUND RECORDINGS PROTECTED BY THE FEDERAL COPYRIGHT ACT WAS PREEMPTED BY 17 U.S.C. § 301 AND RELEVANT CONSTITUTIONAL PROVISIONS.

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CONSTITUTIONAL AND STATUTORY PROVISIONS

Article I, § 8 of the United States Constitution provides in pertinent part:

> This Congress shall have Power ...To promote the Progress of Science and useful Arts, by securing for limited Times to Authors and Inventors the exclusive right to their respective writings and discoveries...

Article VI of the United States Constitution provides in pertinent part:

> This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all Treaties made, or which shall be made, under the authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

17 U.S.C. § 106 provides:

> Subject to sections 107 through 118 [17 USCS §§ 107-118], the owner of copyright under this title [17 USCS §§ 101 et seq.] has the exclusive rights to do and to authorize any of the following:

(1) to reproduce the copyrighted work in copies or phonorecords;

(2) to prepare derivative works based upon the copyrighted work;

(3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending;

(4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; and

(5) in the case of literary, musical, dramatic, and choregraphic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly.

17 U.S.C. § 301 provides:

(a) On and after January 1, 1978, all legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106] in works of authorship that are fixed in a tangible medium of expression and come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], whether created before or after that date and whether published or unpub-

lished, are governed exclusively by this title [17 USCS §§ 101 et seq.]. Thereafter, no person is entitled to any such right or equivalent right in any such work under the common law statutes of any State.

(b) Nothing in this title [17 USCS §§ 101 et seq.] annuls or limits any rights or remedies under the common law or statutes of any State with respect to--

(1) subject matter that does not come within the subject matter of copyright as specified by sections 102 and 103 [17 USCS §§ 102 and 103], including works of authorship not fixed in any tangible medium of expression; or

(2) any cause of action arising from undertakings commenced before January 1, 1978; or

(3) activities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by section 106 [17 USCS § 106].

(c) With respect to sound recordings fixed before February 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. The preemptive provisions of

of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

(d) Nothing in this title [17 USCS §§ 101 et seq.]annuls or limits any rights or remedies under any other Federal statute.

17 U.S.C. § 506 (a) provides:

Any person who infringes a copyright willfully and for purposes of commerical advantage or private financial gain shall be fined not more than $10,000 or imprisoned for not more than one year, or both: Provided, however, That any person who infringes willfully and for purposes of commercial advantage or private financial gain the copyright in a sound recording afforded by subsections (1),(2), or (3) of section 106 [17 USCS § 106(1),(2), or (3)] or the copyright in a motion picture afforded by subsections (1),(3), or (4) of section 106 [17 USCS § 106(1),(3) or (4)] shall be fined not more than $25,000 or imprisoned for not more than one year, or both, for the first such

offense and shall be fined not more than $50,000 or imprisoned for not more than two years, or both, for any subsequent offense.

STATEMENT OF THE CASE

Respondent was charged by information in a Florida State court and subsequently convicted of the offense of "dealing in stolen property" for his particpation in the sale on April 25, 1979, of "bootleg" or "counterfeit" 8-track tape recordings of Ms. Tammy Wynette. 1/ Such recordings were the unauthorized recordings of Ms. Wynette's sound performances, which were protected by 17 U.S.C. §§ 101 et. seq., also known as the Federal Copyright Act. By definition, such recordings were "unauthorized" solely because they were protected by the Act.

1/ The particular sound recording at issue, "Golden Ring" was fixed after February 15, 1972.

Under the terms of the charging instrument, the stolen property in which Mr. Crow was "dealing" consisted of the "royalty rights" owing to Ms. Wynette under the terms of her contract with CBS. In prosecuting respondent, the State of Florida did not seek to establish that Mr. Crow was a party to the contract between Ms. Wynette and CBS, but rather argued that Mr. Crow's unauthorized reproduction deprived Ms. Wynette of royalty rights she would have received under the terms of the contract had he not reproduced her work.

Respondent contended throughout the proceedings below that, by amending the Federal Copyright Act specifically to include 17 U.S.C. § 301, Congress had preempted the legislative field with regard to acts involving the sale of federally copyrighted and protected

materials. Accordingly, any state prosecution of Mr. Crow for his unauthorized reproduction and sale of those materials was preempted by the federal Act. Although this contention was rejected by the state court and the federal district court below, the Eleventh Circuit Court of Appeals agreed and vacated respondent's conviction. Crow v. Wainwright, 720 F.2d 1224 (11th Cir. 1983).

SUMMARY OF THE ARGUMENT

The Court should not invoke its certiorari jurisdiction in the instant case inasmuch as there is no conflict between the decision below and any opinion of this Court or of any other circuit court of appeals. The cases cited by petitioner for the general proposition that the pre-emption doctrine is not a favored one are inapplicable because they do not address the construction to be given Article I, § 8 and Article VI of the United States Constitution and 17 U.S.C. § 301. Congress has explicitly expressed its intent to preempt state law which protect those rights already protected by the Federal Copyright Act.

The case of Goldstein v. California, 412 U.S. 546 (1973) does not create jurisdiction. Goldstein was decided prior to the enactment of 17 U.S.C. § 301. In

Goldstein, this Court held that Congress was free to preempt State copyright law by expressing its intent to preempt such law, but further held that Congress had failed to do so. In response, Congress did express its intent by enacting 17 U.S.C. § 301. Thus, preemption is proper.

In addition, Florida state law does not conflict with the decision of the Eleventh Circuit in the instant case. In State v. Gale Distributors, 349 So.2d 150 (Fla. 1977), the state's highest court 2/ specifically held that a state statute prohibiting the unauthorized duplication of sound recordings fixed prior to February 15, 1972, the effective date of amendment to the Federal Copyright

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2/ Respondent's conviction was not reviewed by the Florida Supreme Court.

Act, was not preempted soley because Congress had expressed its intent not to preempt state laws relating to sound recordings fixed prior to February 15, 1972. In doing so, the court explicitly recognized that had Congress expressed its intent to preempt, such preemption would occur.

17 U.S.C. § 301 provides that all creative works which come within the subject matter of the Federal Copyright Act are to be governed exclusively by that law. The statute is further explicit in its terms that, after January 1, 1978, no person is entitled to any such equivalent right under state law.

The legislative history of the Federal Copyright Act likewise establishes the clear intent of Congress to provide a uniform system of the enforcement of

copyrights. Thus, any state laws seeking to enforce such rights are null and void.

The Eleventh Circuit correctly concluded that the right sought to be vindicated by state prosecution of respondent's activities was equivalent to the rights established under the Federal Copyright Act. The court's decision does not conflict with the established precedent of this or other courts. Accordingly, the invocation of jurisdiction herein is not appropriate.

ARGUMENT

The petitioner seeks to invoke this Court's jurisdiction in this case by arguing that the decision of the Eleventh Circuit below incorrectly applied the doctrine of preemption in determining the validity of respondent's prosecution for "dealing in stolen property." Despite the fact that the property "stolen" was the royalty rights of Ms. Tammy Wynnette, protected as to respondent solely pursuant to the Federal Copyright Act, it argues that the preemption doctrine is inapplicable.

In seeking to invoke this Court's jurisdiction petitioner does not and cannot demonstrate an appropriate basis for this Court's jurisdiction, but instead argues that preemption "is a

severe step, and we contend an unnecessary one." [Petitioner's brief at p. 17]. Such ground does not support an invocation of this Court's jurisdiction. Contrary, to petitioner's argument, an examination of relevant statutes and case law clearly establishes that the Eleventh Circuit was correct in concluding that the State prosecution sought to vindicate rights "equivalent to" those provided by the Federal Copyright Act. Accordingly, it appropriately applied the doctrine of preemption.

17 U.S.C. § 301 specifically states: "[A]ll legal or equitable rights that are equivalent to any of the exclusive rights within the general scope of copyright" (emphasis added), are governed solely by the Federal Copyright Act. There has never been any dispute that the activity engaged in by respondent, in

his unauthorized reproduction of Ms. Wynette's sound recording, constituted a violation of that Act. See 17 U.S.C. § 506 (a); United States v. Smith, 686 F.2d 234 (5th Cir. 1982); United States v. Malicoate, 531 F.2d 439, 440 (10th Cir. 1975); Fame Publishing Co. v. Alabama Custom Tape, 407 F.2d 667 (5th Cir. 1975).

The real question, then, is whether the federal preemption mandated by 17 U.S.C. § 301 is applicable herein where the official charge was "dealing in stolen property," rather than some other charge which more accurately describes the actual activity of selling a bootleg tape. Simply put, because the state proceeding constituted enforcement of a "legal or equitable right" that was "equivalent to any of the exclusive rights" within the Copyright Act, the federal preemption is still applicable.

The actual label placed upon respondent's activity is unimportant here, for as noted by one commentator:

> [When is such a [state] right "equivalent" to one of the rights set forth in Section 106? Is it necessary that a state created right be exactly coextensive with a federally created right under Section 106 in order for such a state right to be preempted? Suppose the state created right is broader than its federal counterpart. For example, the performance right under Section 106(4) is limited to public performances. Would a state created right which required the author's consent for private as well as public performances be immune from preemption because it is not "equivalent" to the federal right? Clearly such a state created right would be the subject of preemption. "The preemption of rights under State law is complete ...even though the scope of exclusive rights given the work under the [Copyright Act] is narrower than the scope of common-law rights in the work might have been." What if the state created right is not broader than the comparable federal right, but simply complementary to it? For example, what of a state law that protected only as against the public performances, leaving the federal remedy available for public performances? It seems clear that such a law would

> also be preempted. "The intention of section 301 is to preempt and abolish any rights under the common law or statutes of a State that are equivalent to copyright ..." Thus, the reference to Section 106 in the Section 301 phrase "equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106" is by way of identification and not limitation. If a state created right is "within the general scope of copyright" it is subject to preemption, even if the precise contours of the right differ from any of those contained in Section 106.

1 Nimmer On Copyright, 1-9, 1-10 (1981 ed.) (Footnotes ommitted)(Emphasis in original).

An examination of the legislative history of the Copyright Act similarly supports respondent's position. As originally drafted, 17 U.S.C. § 301 (b)(3) read:

> Nothing in this title annuls or limits any rights or remedies under the common law or statutes of any State with respect to--
>
> . . . .

> Activities violating rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106, including breaches of contract, breaches of trust, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

H.R. Rep. No. 4347, 89th Cong., 2d Sess. 24 (1966). When presented to the House of Representatives for enactment, the act was amended so as to add several additional state created rights which were said to be immune from federal preemption. These additional state rights included:

> [A]ctivities violating legal or equitable rights that are not equivalent to any of the exclusive rights within the general scope of copyright as specified by Section 106, including rights against misappropriation not equivalent to any of such exclusive rights, breaches of contract, breaches of trust, trespass, conversion, invasion of privacy, defamation, and deceptive trade practices such as passing off and false representation.

S. Rep. No. 22, 94th Cong., 2d Sess. (1976). When the Act came before the House for passage, however, all references to state remedies were deleted and 17 U.S.C. § 301 was passed in its present form.

The preemptive force of 17 U.S.C. § 301 has been, as the Committee Reports have unfailingly stated since 1966, "one of the bedrock provisions of the bill." H.R. Rep. 2237, 89th Cong., 2d Sess. 125, 129 (1966). With considerably more force than in the previous copyright statute, Congress now has made a general preemptive statement. The legislative history of 17 U.S.C. § 301 indicates that only those state causes of action which seek to vindicate rights different in nature from those granted by the copyright monopoly may survive preemption. H.R. Rep. No. 1476, 94th Cong., 2d Sess 132 (1976).

The intention of 17 U.S.C. § 301 is to preempt and abolish any rights under the common law or state statutes that are equivalent to copyright and that extend to works coming within the federal copyright law. The language of 17 U.S.C. § 301, embodying this principle, is intended to be the most unequivocal language possible so as to foreclose any misinterpretation of its unqualified intention that Congress shall act preemptively and to avoid the development of any vague, borderline areas between state and federal protection.

Despite the clear intent of Congress, petitioner argues that "similar rights" have been vindicated by the State with the approval of the federal courts. In doing so, it relies upon cases where there existed no federal protection of the right sought to be vindicated.

For instance, the case of Zacchini v. Scripps-Howard Broadcasting Co., 433 U.S. 562 (1977), dealt solely with the issue of whether the news media was "constitutionally privileged to include in its newscasts matters of public interest that would otherwise be protected by the right of publicity." Id. at 569. Thus, Zacchini has absolutely no relevance to the preemption issue before this Court.

Similarly, the reasoning of Aronson v. Quick Point Pencil Co., 440 U.S. 257 (1979) is not applicable. In that case, the inventor of a new keyholder applied for patent protection. While her application was pending, she negotiated a contract for the manufacture and sale of the device with Quick Point Pencil Co. This contract specifically contemplated the contingency that the device might not be patentable. A patent for the device

was in fact denied and royalties were paid as agreed upon in the contingent agreement. After many years of paying royalties for the device, Quick Point Pencil Co. sought to have the contract declared unenforceable, asserting that the state law which would make the contract enforceable was preempted by the federal patent laws. In enforcing the terms of the contract, this Court noted that the contract was made with absolutely no reliance on the patent statute. Id. at 303-304. This Court further noted that a patent was never granted and hence, the State was not seeking to vindicate any right already protected by the federal patent law.

In contrast, the instant case involved no contractual agreement between the parties. Moreover, the "rights" allegedly stolen by respondent were precisely the rights protected by the Copyright Act and

thus, any state law regarding the subject was preempted by it. See Compco Corp. v. Day-Brite Lighting, 376 U.S. 234 (1964) (when an article is unprotected by a patent or copyright, state law may not forbid others to copy that article); Sears & Roebuck Co. v. Stiffel, 376 U.S. 225 (1964)(state may not prevent the copying of unpatentable articles, since to do so would conflict with federal patent law).

Petitioner similarly misinterprets the impact of Goldstein v. California, 412 U.S. 546 (1973). At the time Goldstein arose there existed no federal copyright protection to prevent the pirating of sound recordings. Additionally, because that case was decided under

the previous Act, there existed no explicit statute expressing the intent of Congress that state law in this area be preempted. Given these facts, this Court held that state law proscribing the unlawful copying of sound recordings was not preempted. In enacting the Copyright Act of 1976, Congress clearly resolved the issues raised in Goldstein in favor of preemption. Accordingly, the legal standard of Goldstein does not establish a conflict justifying the granting of jurisdiction by this Court.

Nor does the Eleventh Circuit's opinion below conflict with state law. The courts of the State of Florida have previously recognized, with regard to musical recordings subsequent to

February 15, 1972, 3/ that federal legislation has preempted any and all state authority in the criminal field for Copyright Act violations. State v. Gale Distributors, Inc., 349 So.2d 150, 152 (Fla. 1977). In Gale, the Florida

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3/ The date of February 15, 1972, is siginificant due to 17 U.S.C. § 301(c), which provides:

> With respect to sound recordings fixed before Feburary 15, 1972, any rights or remedies under the common law or statutes of any State shall not be annulled or limited by this title [17 USCS §§ 101 et seq.] until February 15, 2047. The preemptive provisions of subsection (a) shall apply to any such rights and remedies pertaining to any cause of action arising from undertakings commenced on and after February 15, 2047. Notwithstanding the provisions of section 303 [17 USCS § 303], no sound recording fixed before February 15, 1972, shall be subject to copyright under this title [17 USCS §§ 101 et seq.] before, on, or after February 15, 2047.

Supreme Court specifically addressed the validity of a state statute which proscribed the unauthorized copying of sound recordings "fixed" prior to February 15, 1972, and noted:

> Since we find no violation of the Supremacy Clause of the Constitution of the United States so long as the act is construed to apply to recordings "fixed" before February 15, 1972, we have for disposition the challenge of vagueness against the constitutionality vel non of Section 543.041(2)(b).

Id. at 153 (Emphasis added). Accordingly, there is no basis for this Court to accept jurisdiction in this case.

CONCLUSION

This Court should not invoke its jurisdiction to review this case. There is no conflict between the decision below and other authority which would justify review herein. The rights sought to be vindicated by petitioner in prosecuting respondent for his unauthorized reproduction of a sound recording were "equivalent to" those protected by the Federal Copyright Act. Accordingly, this Court should decline to review the decision of the Eleventh Circuit Court of Appeals below.

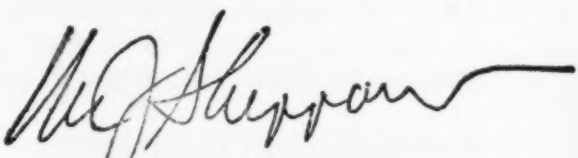
Respectfully submitted,

Wm. J. Sheppard
215 Washington Street
Jacksonville, Florida 32202
(904) 356-9661

Attorney for Respondent

CERTIFICATE OF SERVICE

I hereby certify that a copy of this Brief in Opposition has been furnished to Gregory C. Smith, Esquire, Assistant Attorney General of Counsel, The Capitol, Tallahassee, Florida, 32301-8048, by depositing same in a United States post office or mail box with first-class postage prepaid, this 22nd day of May, 1984.



Wm. J. Sheppard